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SUPREME COURT, U.S.

No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

RICK T. BEARD, III
STUART P. MILLER
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD PLLC
425 West Capital Avenue
Suite 1800
Little Rock, AR 72201
(501) 688-8800

MURRAY R. GARNICK *
JAMES M. ROSENTHAL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20005
(202) 942-5000

Counsel for Respondent

* Counsel of Record

April 21, 2006

CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Philip Morris USA Inc. is a wholly-owned subsidiary of Altria Group, Inc.[1] Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

[1] Altria Group, Inc. (identified in plaintiffs' complaint and in the caption by its former name, Philip Morris Companies, Inc.) was never served process in plaintiffs' lawsuit and therefore is not a party to this appeal.

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INTRODUCTION

This case does not meet the Court's standards for review. There is no circuit conflict. In each of the six circuit court cases cited by petitioners, the court found that removal under 28 U.S.C. § 1442(a)(1) was proper. None of the cases disagreed with the reasoning in any other case or rejected the approach taken by the Eighth Circuit below. None of the cases even acknowledged any confusion in the case law. Rather, the cases reflect only different factual scenarios in which removal under § 1442(a)(1) may be invoked. And, because the six decisions do not purport to define the full reach of the removal statute, they do not create a conflict even by implication. Simply put, petitioners have attempted to manufacture a circuit conflict where none exists.

The Eighth Circuit's holding is not likely to be applied to other industries or other contexts. The Eighth Circuit reached its decision based on the "*unique*" and "*unusual*" facts with respect to the Federal Trade Commission's ("FTC") 40-year regulatory history over cigarettes, finding that "[t]he FTC involved itself in the tobacco industry to an *unprecedented* extent." Pet. App. 13a. (emphases added). As Judge Gruender emphasized in his concurrence, this is "a rare case" insofar as "the FTC's direction and control of the testing and marketing practices at issue is extraordinary." *Id.* at 18a. Furthermore, even in the context of tobacco litigation, the decision below will not apply to future class actions, given the enactment of the Class Action Fairness Act of 2005 ("CAFA"). CAFA (enacted after removal below) now provides an independent basis for removal of class actions such as this one.

In any event, other than the Eighth Circuit, no federal appeals court has addressed the availability of § 1442(a)(1) removal in the specific "lights" cigarette factual context presented by this case. Notably, the Seventh Circuit has recently granted interlocutory review in *Kelly v. Martin &*

Bayley, Inc., No. 06-8007 (7th Cir. Mar. 6, 2006) (reviewing 2006 WL 44183 (S.D. Ill. Jan. 9, 2006)), an individual lights cigarette case that raises the same issue regarding removal under § 1442(a)(1) as presented by this case. That development makes review by this Court of the application of § 1442(a)(1) to a "lights" case particularly premature.

As demonstrated below, this case does not warrant review because the holding below is correct, consistent with this Court's guidance concerning § 1442(a)(1), does not conflict with any other circuit court case, and is not likely to be applied beyond the unique factual context of the FTC's regulatory history at issue here.

STATEMENT OF THE CASE

A. History Of FTC Regulation

1. The FTC Method

For over 40 years, the FTC has exercised unprecedented detailed and direct control over the measurement and disclosure of cigarettes' tar and nicotine yields, including precisely what information the tobacco companies could and could not disclose to consumers in advertising.[2] The FTC itself initially measured tar and nicotine yields in its own lab, and now requires the tobacco companies to conduct the testing to detailed specifications under FTC supervision. As the Eighth Circuit noted, the record shows "comprehensive

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[2] The FTC has broad authority under the FTC Act, 15 U.S.C. § 45, to address deceptive advertising. Moreover, in the Federal Cigarette Labeling & Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*, Congress specifically affirmed the FTC's regulatory authority with respect to cigarette advertising and even required the FTC to report annually to Congress relating to cigarette advertising practices. *See* 15 U.S.C. § 1336; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001) ("to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC").

and detailed control," as the FTC has "involved itself in the tobacco industry to an unprecedented extent." Pet. App. 13a.

In the early 1950s, scientific studies linking cigarettes to cancer identified "tar" (the particulate matter in cigarette smoke other than nicotine) as the cause of the health problems associated with smoking. DA-1-3.[3] Manufacturers responded by making filtered cigarettes and by marketing cigarettes based on claims of lower tar and nicotine delivery. DA-4. The manufacturers, however, employed different methods to measure tar and nicotine yields, which made it difficult to compare claims. DA-4. Concerned that the claims were confusing, the FTC in 1959 directed the tobacco companies to cease making any representations regarding tar and nicotine yields. DA-4-6.

By 1966, the public health community was urging tobacco companies to develop reduced tar cigarettes and encouraging the FTC to lift its tar and nicotine advertising ban. DA-21; 31-36; 38-40. The FTC responded by developing its own test for measuring tar and nicotine yields (the "FTC Method") and making it the only permissible test for substantiating any advertising claim regarding tar and nicotine yields. Pet. App. 24a; DA-33; 37; 680; 685. The FTC specifically advised that the use of any other method as a basis for such claims would be deemed deceptive. DA-294-96; Pet. App. 24a. The FTC thus encouraged manufacturers to compete based on tar and nicotine yields, but only with reference to FTC Method results.

Before the FTC adopted the FTC Method, the scientific community and cigarette companies (including PM USA) advised the FTC that its method did not measure the actual amount of tar and nicotine that smokers would receive. Pet. App. 3a. The FTC responded that its method was not intended "to determine the amount of tar and nicotine inhaled

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[3] Citations to DA-xx are references to respondent Philip Morris USA's ("PM USA") Appendix, filed before the Eighth Circuit.

by any human smoker," but concluded that it provided a "standardized method" that consumers could use to compare cigarettes. DA-294-96; Pet. App. 3a.

The FTC established detailed testing specifications for its method, including how cigarettes must be gathered for testing, how they must be stored prior to testing, and how the testing machine itself must be operated. Pet. App. 8a; DA-37; 248; 294-96.[4] For the next 20 years, the FTC operated the testing lab itself. Pet. App. 3a; 9a; 13a; 26a-27a; 41a. In 1987, the FTC transferred testing to the tobacco companies, but retained unlimited monitoring and inspection rights to ensure complete conformity with its specifications. *Id.* at 9a; 26a-27a. PM USA must now submit FTC Method results to the FTC under penalty of perjury. *Id.* at 28a; 42a.

2. FTC Direction With Respect To The Disclosure Of Tar And Nicotine Yields

With the adoption of the FTC Method and the opening of the FTC's Tobacco Testing Laboratory, the FTC began publishing tar and nicotine yields of cigarette brands in the Federal Register and in its annual reports to Congress (pursuant to its statutory reporting obligation). Pet. App. 3a; 42a. In 1970, the FTC proposed a regulation requiring manufacturers to disclose tar and nicotine yields in all cigarette advertising, but suspended its rulemaking after "compell[ing]" the industry to reach an acceptable agreement imposing essentially the same requirements that would have

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[4] In particular, the FTC's testing method required the following: "(1) [s]moke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm., (2) [b]ase results on a test of 100 cigarettes per brand, or type, (3) [c]igarettes to be tested will be selected on a random basis, as opposed to 'weight selection,' (4) [d]etermine particulate matter on a 'dry' basis . . . to determine the moisture content, (5) [d]etermine and report the 'tar' content after subtracting moisture and alkaloids (as nicotine) from particulate matter, [and] (6) [r]eport tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligram." Pet. App. 8a.

been imposed by the proposed regulation. *Id.* at 10a-11a; *see also id.* at 3a; 25a; 41a. The agreement specified the precise language that the tobacco companies were required to use in disclosing tar and nicotine yields in all advertisements. *Id.* at 26a; 9a. Furthermore, the FTC directed that the disclosure of information about tar and nicotine measurements had to be substantiated by the FTC Method. *Id.* at 11a. The FTC repeated this direction even when a tobacco company in 1978 sought to claim tar and nicotine yields *higher* than those measured according to the FTC Method. *Id.* at 11a-12a.

The FTC has vigorously enforced its directive that the tobacco companies use the FTC Method. For example, in 1969, the FTC brought proceedings against a cigarette company for stating that certain brands were lower in tar when the claim was not substantiated by the FTC Method. DA-530-35. A 1971 decree resolving the case banned the use of descriptive terms such as "low," "lower," "reduced," or "like qualifying terms," unless the term was substantiated by the FTC Method. Pet. App. 15a. Contrary to petitioners' contentions, Petition for a Writ of Certiorari ("Pet.") at 28, the FTC also "formally defined" "low tar" cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method. DA-31-36; Pet. App. 15a; 29a. More recently, in a similar consent decree reached in 1995, the FTC reaffirmed its requirement that information about tar and nicotine yields be substantiated based exclusively on FTC Method results. DA-624-26; Pet. App. 30a.

Since the adoption of its testing program, the FTC has repeatedly considered claims that the FTC Method was misleading and that tobacco companies should not be required to base all information about tar and nicotine yields on it. In 1977, for example, the FTC examined the claim that its measurements were misleading because some smokers might cover ventilation holes that are used on many cigarettes, including "lights," to dilute the smoke with air. Pet. App. 15a-16a; DA-352. In 1981, the FTC undertook a broad-based

study of low tar cigarettes and "compensatory smoking" -- *i.e.*, changes in smoking behavior (such as deeper puffs) that may accompany a switch to lower yield cigarettes. DA-307-21; 419-22; 423-25. And, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether terms like "lights" and "low tar" were deceptive. DA-708-806; 547-52.

Each time, the FTC decided to continue requiring the tobacco companies to disclose information regarding tar and nicotine yields and to use the FTC Method. It did so for two reasons. *First*, the FTC relied on studies showing that smokers of lower FTC-measured yield cigarettes had a lower risk of disease than smokers of higher yield cigarettes. DA-310-11; 320; 715. Thus, the FTC determined that, notwithstanding its limitations, the FTC Method provided consumers with meaningful information regarding the relative risks posed by different types of cigarettes. DA-698; 707. *Second*, the FTC retained its method because it provided a single standardized rating system that consumers could use to compare brands and on which competition could be based. DA-359-60.

In 1997, the FTC reopened its investigation of whether the term "lights" is deceptive to consumers and whether a new test methodology should be adopted. 62 Fed. Reg. 48,158 (Sept. 12, 1997). That investigation remains open. In the meantime, the FTC continues to require manufacturers to measure tar and nicotine yields by the FTC Method and report those measurements -- and only those measurements -- to the public. Pet. App. 34a; 43a.

B. The Complaint

In April 2003, petitioners filed this massive putative class action in Arkansas state court on behalf of all persons who purchased at least one pack of Marlboro Lights or Cambridge Lights (together, "Lights") in Arkansas over a 30-year period. Petitioners allege that PM USA violated the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-107 *et seq.*, and has been unjustly enriched. Petitioners do not seek to recover for illnesses relating to smoking Lights. Instead, they seek purported economic damages in the form of a total or partial refund of the purchase price of Lights. Pet. App. 72a ¶ 47. Petitioners claim that they suffered a financial loss when they failed to receive a true "light" cigarette, even though Lights have always been priced the same as their full-flavored counterparts. *Id.* at 71a ¶ 41.

Petitioners do not dispute that Lights yield less tar and nicotine than full-flavor cigarettes when tested under the FTC Method. In fact, they agree that FTC Method results provide "support" for any such representation. *Id.* at 63a-64a ¶ 9. Nevertheless, petitioners claim that PM USA's use of low tar descriptors such as "lighter" or "lower tar" are "deceptive and misleading." *Id.* at 64a ¶ 10. Petitioners allege that Lights "register misleading tar and nicotine measurements" under the FTC Method, *id.* at 67a ¶ 22b, because "consumers receive higher levels of tar and nicotine than the testing apparatus registers." *Id.* at 64a ¶ 11. Thus, petitioners directly attack the validity of the FTC Method and PM USA's conduct in carrying out the FTC's directives to use the FTC Method and disseminate its results to consumers.

C. Removal And Decision

On July 2, 2003, PM USA timely removed petitioners' case to the U.S. District Court for the Eastern District of Arkansas, asserting that removal was proper under § 1442(a)(1), because petitioners' allegations challenged conduct taken under the direction of the FTC.

The district court (Eisele, J.) denied petitioners' motion for remand on December 12, 2003, finding jurisdiction under § 1442(a)(1) on an undisputed record. *See* Pet. App. 58a. The court certified its opinion for interlocutory review pursuant to 28 U.S.C. § 1292(b) and stayed the case pending appeal.

Contrary to petitioners' claims, the district court did not state that "its decision expanded the scope of § 1442(a)(1)." Pet. at 7; *see* Pet. App. 57a-60a. Nor did the district court recognize the circuit split that petitioners claim exists with respect to the "acting under" requirement. The court simply concluded that appellate review pursuant to § 1292(b) certification was appropriate because a few *district courts*, applying the same legal standard, had rejected removal in similar lights cases. Pet. App. 58a-59a.

D. The Eighth Circuit Decision

The Eighth Circuit accepted review and unanimously affirmed. The court applied the four-prong test established by this Court for determining whether removal under § 1442(a)(1) was appropriate: that the defendant "(1) act under the direction of a federal officer; (2) show a nexus or 'causal connection' between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a 'person' within the meaning of the statute." Pet. App. 4a (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999); *Mesa v. California*, 489 U.S. 121, 125 (1989)). The court found each requirement satisfied.

First, relying on *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), the Eighth Circuit explained that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. The court explained that "[m]ere participation in a regulated industry is insufficient to support

removal." *Id.* at 6a. Rather, the removing party must show that the federal officer provided a sufficiently high level of "control and direction." *Id.* at 8a.

Based on an examination of the FTC's regulatory history, the Eighth Circuit found a "level of compulsion that establishes that Philip Morris was indeed 'acting under' the direction of a federal officer." *Id.* at 10a. The court explained that the FTC, through its regulatory program, exercises "comprehensive, detailed regulation" and "ongoing monitoring" and that it "controls the delivery of tar and nicotine information to consumers." *Id.* at 13a.

Second, the Eighth Circuit found that PM USA had demonstrated the necessary causal connection between the FTC's direction and the allegations in the petitioners' complaint. *Id.* at 13a-16a. As the court summarized: "[w]hether Philip Morris's labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies." *Id.* at 15a.

Finally, although the petitioners did not contest the remaining two requirements, the Eighth Circuit "review[ed]" those requirements "for jurisdictional purposes." *Id.* at 17a. The court had "no hesitation in concluding that Philip Morris, in its Notice of Removal, has set forth a colorable federal defense" -- federal preemption. *Id.* The court also held that a corporation "can be a 'person' within the requirements of federal officer removal." *Id.* at 17a-18a.

In a separate concurring opinion, Judge Gruender explained that the court's decision would not apply to the typical participant "in a heavily regulated industry." *Id.* at 18a. This case was unique, he emphasized, because "[t]he FTC developed the [FTC Method], conducted the testing itself for twenty years before farming it out to the cigarette companies, threatened a deceptive advertising action if the method of testing deviated in the smallest way from the government-mandated method and controlled the disclosure of the results

throughout." *Id.* Judge Gruender stressed that "the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever." *Id.* Judge Gruender concluded that "this is a rare case in which federal officer jurisdiction is appropriate even in the absence of a contract, principal-agent relationship, or near employee relationship with the government." *Id.* at 18a-19a.

Petitioners thereafter petitioned for rehearing and rehearing *en banc*, which were denied. *Id.* at 61a.

REASONS FOR DENYING THE PETITION

This Court should deny review. All six circuit court cases cited by petitioners, as well as the Eighth Circuit below, upheld federal officer removal in a range of factual contexts, all of which involved a defendant being sued for actions that were subject to the direction, control, and supervision of federal officials carrying out official federal functions under federal law. None of the cases conflicts with any of the others; none of them conflicts with *Watson*. This is not a circuit conflict except in the imagination of petitioners. And, far from a conflict or even any confusion, the district court decisions reveal a remarkable consistency in defining the legal test for § 1442(a)(1) removal -- a test identical to the one the Eighth Circuit applied below.

Moreover, the Eighth Circuit's decision was based on a heavily fact-intensive examination of the "unique" and "unusual" facts relating to the FTC's regulatory history. As a result, this case will have no application beyond the tobacco context -- and at most limited application in the tobacco context, given the enactment of CAFA, which provides an independent basis for federal court jurisdiction over future class actions. In any event, the Eighth Circuit is the only circuit court to have addressed § 1442(a)(1) in the context of a tobacco case. The Seventh Circuit recently granted review

of a decision to allow removal under similar circumstances. That is enough, in and of itself, to make review by this Court at this time inappropriate.

Finally, this decision is entirely consistent with this Court's interpretation of § 1442(a)(1). Petitioners propose to limit the federal officer statute in a manner that conflicts with both this Court's guidance and the plain language of the statute.

I. THERE IS NO CIRCUIT CONFLICT

A. The Eighth Circuit's Decision Is Entirely Consistent With Other Circuit Court Decisions Applying § 1442(a)(1)

Petitioners attempt to manufacture a circuit conflict where none exists. They claim that the First, Seventh, and Eleventh Circuits apply an "official function" test, that the Fifth and Eighth Circuits apply a "comprehensive federal control" test, and that the Ninth and Tenth Circuits apply a "general supervision" test. Pet. at 10-17. These "tests" are made up for the petition. They do not appear in any of the six decisions that petitioners cite as evidence of the "deep division" among the courts of appeals.

In each case cited by petitioners, the circuit court found that removal was proper, and none purported to set out a legal test for removal contrary to the holding of any other circuit. Indeed, none of the cited decisions expressed disapproval of any other decision or even noted the existence of any confusion among the courts.

At bottom, the six cited cases reveal nothing more than different factual scenarios in which § 1442(a)(1) removal may be appropriate. The mere fact that the statute may apply to a range of different kinds of cases hardly constitutes a "conflict" justifying this Court's review.

For example, petitioners cite *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), for the proposition that the First Circuit requires that the conduct

at issue have an "official character" before § 1442(a)(1) applies. Pet. at 10-11. But nowhere in the opinion did the First Circuit purport to adopt such a requirement. There, the defendants (telephone companies) invoked § 1442(a)(1) because they helped federal officials implement a duly authorized wiretap. The complaint expressly alleged that the defendants had acted under the orders, control, and directions of the federal officers. In upholding the removal, the First Circuit held only that such allegations were sufficient for purposes of invoking the statute. 868 F.2d at 486-87. The First Circuit did not address whether removal would be proper in other settings.

Venezia v. Robinson, 16 F.3d 209 (7th Cir.), *cert. denied*, 513 U.S. 815 (1994) (cited in Pet. at 11), involved a state officer participating in an FBI undercover sting operation. The Seventh Circuit held merely that removal was proper; as in *Camacho*, the court did not purport to consider under what other circumstances removal may be appropriate. *Id.* at 212.

In *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996) (cited in Pet. at 12), the Eleventh Circuit similarly found that a private party had properly invoked § 1442(a)(1). There, the private party was sued as an authorized agent of the Federal Aviation Administration. Again, as in *Camacho* and *Venezia*, the circuit court held only that such a circumstance was sufficient for removal. Notably, Judge Gibson -- who authored *Watson* -- served on the panel in *Magnin*. *See id.* at 1426 (sitting by designation). Judge Gibson gave no indication that he saw any conflict between the two decisions.

In the only case cited by petitioners even remotely analogous to the case here, *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999) (cited in Pet. at 13-14), the Fifth Circuit found § 1442(a)(1) removal proper, just as the Eighth Circuit did here. There, a plaintiff asserted product liability claims

against an Agent Orange manufacturer. The court found that the government specified the formula for Agent Orange, as well as its packaging, labeling, and shipping. *Id.* at 399. The government also inspected the labeling of the containers and compelled the manufacturer to deliver Agent Orange to it under threat of criminal sanctions. *Id.* at 399-400. The court concluded that the manufacturer had acted pursuant to federal direction. *Id.* at 400.

Finally, petitioners cite two unpublished cases from the Ninth and Tenth Circuits. Pet. at 16-17. In *California v. H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995), the Ninth Circuit held that when a private party is hired to help the Coast Guard remove spills, the private party can invoke § 1442(a)(1). And in *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000), the Tenth Circuit similarly held that a private company implementing a remedy for clean up ordered by the Environmental Protection Agency can invoke § 1442(a)(1). Neither case is inconsistent with the Eighth Circuit decision. Nor did either case purport to limit removal under § 1442(a)(1) in a manner that would yield a different result here. Indeed, in *Greene*, the Tenth Circuit favorably cited the Fifth Circuit's decision in *Winters*. *See* 2000 WL 647190, at *2.

In short, contrary to petitioners' argument, the First, Seventh, and Eleventh Circuit have not taken an "approach" that is inconsistent with the Eighth Circuit or contrary to the Fifth Circuit's *Winters* decision. *See* 166 A.L.R. Fed. 297, § 4 (listing *Camacho*, *Winters*, and *Magnin* as applying the same "acting under" standard). Rather, the cases that have come before the First, Seventh, and Eleventh Circuits simply have not required them to consider the full range of circumstances in which the statute might apply. In the only remotely analogous case petitioners cite -- *Winters* -- the court found removal proper.

There is no reason to think that the outcome of this case would have been any different in any other circuit. Accordingly, there is no division of authority that would warrant this Court's review.

B. The Eighth Circuit's Decision Is Consistent With District Court Decisions Applying § 1442(a)(1)

Petitioners suggest that there is also confusion among the district courts regarding the appropriate legal test for determining when a private party is "acting under" a federal officer. Pet. at 9 n.1. To the contrary, the district court decisions reveal remarkable consistency in defining the legal test.[5]

The district courts are uniform in holding that mere participation in a regulated industry is insufficient. Rather, courts recognize that a defendant must demonstrate that a federal officer had "direct and detailed control" over the operation in question. *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992). "Direct control is established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control." *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (citation and quotations omitted). This test has been adopted by district courts in virtually every circuit.[6] It is the same test expressly adopted and applied by the Eighth Circuit below. Pet. App. 6a-13a.

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[5] Petitioners quote a sentence from PM USA's appellate brief that courts have "articulated different legal tests to describe the level of federal direction necessary." Pet. at 10 (citing Appellee's Br. 35). Plaintiffs omit the rest of that paragraph, which explained that "[t]he substance of the standard, however, is the same." Appellee's Br. at 36.

[6] *King v. Provident Bank*, No. 2:05-CV-961, 2006 WL 902271, at *4 (M.D. Ala. Apr. 6, 2006); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005); *Epperson v. Northrop Grumman Sys. Corp.*, No. 4:05CV2953, 2006 WL 90070, at *3 (E.D. Va. Jan. 11, 2006); *Edwards v. Blue*

Indeed, district courts in the First, Seventh, and Eleventh Circuits have adopted and applied this test without noting any confusion or concern as to whether the law in their circuits may be different. For instance, within the Eleventh Circuit, the district court in *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (cited in Pet. at 10 n.2), upheld removal based on a government contract relationship where a federal officer supervised the performance of the contract. *Id.* at 1196-97. In so holding, the court relied heavily on cases that petitioners erroneously characterize as contrary to Eleventh Circuit law. *Id.* at 1196 (citing *MTBE*, 342 F. Supp. 2d at 154); *see also* Pet. at 15 (discussing *MTBE*). Similarly, in *King v. Provident Bank*, No. 2:05-CV-961-MEF, 2006 WL 902271 (M.D. Ala. Apr. 6, 2006), the court cited both *Watson* and *Magnin* in ruling that "[a] defendant's actions taken pursuant to a comprehensive and detailed federal regulatory scheme may qualify the

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Cross/Blue Shield of Tex., No. Civ. 3:05CV0144-H, 2005 WL 1240577, at *4 (N.D. Tex. May 25, 2005); *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404-405 (D.N.J. 2005); *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562 (D. Md. 2004); *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004); *In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 448 (E.D.N.Y. 2004); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004); *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2 (C.D. Cal. Jan. 28, 2003); *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1152-53 (D. Colo. 2002); *Haller v. Kaiser Found. Health Plan of the NW*, 184 F. Supp. 2d 1040, 1044 (D. Or. 2001); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *4 (M.D. La. Aug. 6, 1998); *Ajemba v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, Civ. No. 98-713, 1998 U.S. Dist. LEXIS 22297 (D.D.C. July 14, 1998); *Crocker v. Bordon, Inc.*, 852 F. Supp. 1322, 1325-26 (E.D. La. 1994); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994).

defendant as 'acting under' the direction of a federal officer." *Id.* at *4.[7]

Under the test applied by these courts, only rarely will a private party involved in implementing federal policy and programs qualify for removal under § 1442(a)(1). The district courts have had no problem in distinguishing between cases that satisfy this standard and those that do not.[8]

Finally, petitioners note that a few district court cases reached a different outcome with respect to § 1442(a)(1) removal in lights cases. *See* Pet. at 15 n.8. Those courts, however, applied the same legal standard as the Eighth Circuit; they simply reached a different conclusion as to whether the FTC had exercised sufficient control for purposes of § 1442(a)(1). *See, e.g., Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004)

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[7] Plaintiffs also cite, as "follow[ing] the Fifth Circuit," two other courts in the Seventh and Eleventh Circuits. *See* Pet. at 14 & n.7 (citing *Park*, 402 F. Supp. 2d at 967; *Kennedy*, 329 F. Supp. 2d at 1318).

[8] *See, e.g., City of Livingston v. Dow Chem. Co.*, No. C 05-03262, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005) ("[t]he grant of an EPA registration does not constitute direction from the federal government") (citation and quotation omitted); *Kaye v. Southwest Airlines Co.*, No. Civ.A.3:05CV0450-D, 2005 WL 2074327 (N.D. Tex. Aug. 29, 2005) (rejecting removal in airline industry); *Kennedy*, 329 F. Supp. 2d 1314 (removal inappropriate despite Medicare regulations); *Jamison v. Purdue Pharma Co.*, 251 F. Supp. 2d 1315, 1326-27 (S.D. Miss. 2003) (regulated status of drug manufacturers and marketers is insufficient for removal); *Guckin v. Nagle*, 259 F. Supp. 2d 406, 415-18 (E.D. Pa. 2003) (rejecting removal in the claim related to FDA-approved medical device); *Russell v. Baxter Healthcare Corp.*, No. CIV.A.01-2296, 2002 WL 975679, at *8 (E.D. La. May 10, 2002) ("While the FDA licensed and regulated many of defendants' activities with respect to the production, manufacturing, [and] distribution . . ., the federal involvement was not so invasive" so as to warrant § 1442(a)(1) removal); *Little v. Purdue Pharma, L.P.*, 227 F. Supp. 2d 838, 860-62 (S.D. Ohio 2002) (regulated drug manufacturers not entitled to removal).

(defendant must establish "direct and detailed control"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845 (N.D.W. Va. 2004) (requiring conduct "performed pursuant to an officer's direct orders or to comprehensive and detailed regulations") (citation and quotations omitted); *Pearson v. Philip Morris USA, Inc.*, Civ. No. 03-CV-178, 2003 U.S. Dist. LEXIS 24508, at *5 (D. Or. Aug. 8, 2003) (requiring "direct and detailed" control) (citation omitted). Any "conflict" raised by these district court cases does not warrant Supreme Court review. *See* Robert L. Stern, *et al.*, Supreme Court Practice 229 (8th ed. 2002); *see also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Notably, the Seventh Circuit recently accepted interlocutory review of a decision permitting § 1442(a)(1) removal in a personal injury action based on lights allegations. *See Kelly v. Martin & Bayley, Inc.*, No. 06-8007 (7th Cir. Mar. 6, 2006); *see also* Pet. at 16 n.8 (noting pending review). Accordingly, in the near future, a second circuit court will rule on the availability of § 1442(a)(1) removal in the lights cigarette context. Petitioners have offered no good reason why this Court should grant review of this issue now when no other circuit court has addressed the issue and when another circuit will do so imminently.[9]

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[9] Petitioners refer to certain statements made by lawyers for the Department of Justice (DOJ) in the course of ongoing RICO litigation against PM USA and other tobacco companies. *See* Pet. at 23-24. In the court below, *amici* attempted to rely on these statements in supporting rehearing or reconsideration *en banc*, but the Eighth Circuit struck the statements as outside the record. *Watson v. Philip Morris USA*, No. 04-1225, Order (8th Cir. Nov. 2, 2005). Furthermore, petitioners ignore that in that litigation the FTC had someone speak directly on its behalf -- the Deputy Director of the FTC's Bureau of Consumer Protection testifying in a Rule 30(b)(6) capacity. The Eighth Circuit found that this testimony supported its decision below. Pet. App. 13a.

II. THE ISSUE PRESENTED IS NOT WORTHY OF REVIEW BECAUSE IT IS LIMITED TO THE LIGHTS CIGARETTE CONTEXT

Petitioners contend that permitting § 1442(a)(1) jurisdiction here will inevitably swamp the federal courts by permitting jurisdiction for all regulated industries. Pet. at 29-30. These "Chicken Little" fears are entirely groundless. Indeed, the courts' reaction to the Fifth Circuit's decision in *Winters* proves the point. Petitioners assert that the Eighth Circuit's approach "tracks" the Fifth Circuit's approach in *Winters*. Pet. at 13. *Winters*, however, was issued over eight years ago -- in 1998 -- yet petitioners can point to no resulting explosion in cases pending in federal court because of removals under § 1442(a)(1).[10] As noted above, no court -- including the Eighth Circuit in *Watson* -- has held that mere participation in a regulated industry is sufficient to justify removal under § 1442(a)(1). Pet. App. 6a.

This case is not worthy of review because the Eighth Circuit's decision is based on a one-of-a-kind regulatory program and thus presents issues that will not "frequently arise." *Perry v. Leeke*, 488 U.S. 272, 277 (1989). The Eighth Circuit made clear that its decision was based on the "*unique*" and "*unusual*" facts with respect to the FTC's 40-year regulatory history. Pet. App. 13a (emphases added). As the court summarized, "[t]he FTC involved itself in the tobacco industry to an *unprecedented* extent." *Id.* (emphasis added). For example, the Eighth Circuit found that the FTC:

1. specified the testing method that was to be used for measuring tar and nicotine yields, *id.* at 8a-9a;

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[10] CAFA, for example, has had a much more significant impact. Between its enactment on February 18, 2005 and April 19, 2006, a search of Westlaw reveals 86 reported decisions addressing whether removal is proper under CAFA. By contrast, during that period, there were 27 reported decisions addressing whether private parties could remove under the federal officer statute, and only 7 permitted removal.

2. "itself conducted the entire testing process for twenty years," *id.* at 9a;[11]

3. "now requires the cigarette manufacturers to conduct testing to its specifications," Pet. App. 9a;

4. "continues to inspect the industry labs, independently verify the results, and publish the ratings," *id.*;

5. "compelled the tobacco industry to advertise the tar and nicotine ratings" measured by the FTC's test, *id.* at 11a;

6. directed the "specific manner" in which the industry must advertise the FTC's tar and nicotine measurements, *id.* at 8a-9a;

7. "made it clear" that "it has not found any other testing method adequate" and that it would be "deceptive" to use any other method even if the alternative method produced *higher* yields, *id.* at 11a;

8. "was well-aware of the limitations" of its test and even "studied" how cigarette design features "affected their tar and nicotine ratings," yet "ultimately chose to continue using" its test, *id.* 15a-16a;

9. "monitor[s] cigarette ads and occasionally bring[s] claims against [the] companies," *id.* at 9a; and

10. declared and affirmed that the use of such terms as "low tar" and "lights" were not deceptive as long as they were substantiated by the FTC Method, *id.* 13a-16a.

Given the "unique" and "unprecedented" FTC history upon which the Eighth Circuit's decision was based, the decision will have little or no impact outside of the lights cigarette

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[11] Petitioners question why the Eighth Circuit found the fact that the FTC conducted the testing itself to be significant. Pet. at 28 n.16. That the FTC developed and conducted the test in its own labs for two decades is one indication of the extent to which the FTC has gone beyond mere regulation and is actively participating in and controlling the challenged conduct. Indeed, as the Deputy Director of the FTC's Bureau of Consumer Protection recognized, the FTC's creation of its own testing lab "was really something that was unique." Pet. App. 13a.

context. Indeed, Judge Gruender wrote separately to warn that *Watson* "should not be construed as an invitation to every participant in a heavily regulated industry" to invoke removal. *Id.* at 18a. Judge Gruender emphasized that "this is a *rare* case," in which the "FTC's direction and control of the testing and marketing practices at issue is *extraordinary*." *Id.* (emphases added).[12]

Contrary to petitioners' predictions, Pet. at 27-28, courts are not ignoring Judge Gruender's admonitions. No court has relied on the Eighth Circuit's decision as the basis for removal for any other industry. To the contrary, courts outside of the lights cigarette context have recognized the limited nature of the decision. Indeed, one court refused to apply it to the medical device context -- one of the very regulatory contexts in which petitioners contend cases would become removable under *Watson*. *Compare* Pet. at 30 (identifying medical devices as regulatory scheme that is supposedly no different from the FTC's program here) *with Parks*, 402 F. Supp. 2d at 969-70 (distinguishing *Watson* based on the "unprecedented" FTC history with respect to light cigarettes); *see also King*, 2006 WL 902271, at *4 (rejecting an argument that *Watson* compels removal in the home lending context).[13] In the unlikely event that *Watson* did lead to a dramatic increase in removals for other industries, this Court could grant review in one of those cases at that time. It makes no sense to grant review now, when there is no indication that *Watson* will have any impact outside of lights cigarette litigation.

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[12] Indeed, this Court has recognized that, "[o]wing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[13] Courts have rejected removal in other regulated industries identified by petitioners. *See, e.g.*, *Kaye*, 2005 WL 2074327 (airline industry); *Guckin*, 259 F. Supp. 2d at 417 (FDA-approved medical device).

Finally, even *within* the tobacco context, *Watson* will have limited application, particularly with respect to the most complex and burdensome cases -- *i.e.*, class actions. The enactment of CAFA on February 18, 2005 -- *after Watson* was filed -- provides an independent basis for removal and thus obviates the need for § 1442(a)(1) removal for *Watson*-type class actions filed after February 18, 2005. Thus, even with respect to class actions like *Watson*, removal under § 1442(a)(1) is unlikely to recur beyond *Watson* and a very small number of other cases pending before CAFA took effect.[14] This is yet another reason why there is no basis for this Court's review.

III. THE EIGHTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH § 1442(A)(1) AND THIS COURT'S PRECEDENTS

The decision below is entirely consistent with the statute and decisions of this Court. The Eighth Circuit expressly relied upon this Court's four-prong test for removal under § 1442(a)(1), which requires that the defendant (1) act under the direction of a federal officer; (2) show a nexus or "causal connection" between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a

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[14] Of the 17 lights class actions or putative class actions pending against PM USA in state court, PM USA removed only two pending class actions based on the Eighth Circuit's decision in *Watson* -- the two other lights class actions filed before CAFA that were pending against PM USA in state courts within the Eighth Circuit. In one of these two cases, *Curtis v. Altria Group, Inc.*, Case No. 0:05-cv-02231-JMR-FLN (D. Minn. Feb. 14, 2006), the court denied plaintiffs' motion to remand. In the other, the court remanded, concluding that the removal was not timely. *See Craft v. Philip Morris Cos.*, No. 4 05-CV-01531ERW (E.D. Mo. Mar. 17, 2006). Nor is the decision below likely to have broad application to individual smoking and health cases. Many smoking and health cases are within federal jurisdiction based on diversity of citizenship. Further, most do not make the lights-specific allegations at issue here and therefore would not implicate the decision below.

"person" within the meaning of the statute. *See* Pet. App. 4a (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999), and *Mesa v. California*, 489 U.S. 121, 124-25 (1989)). This Court's decisions recognize that Congress provided, in broad and inclusive language, for removal not just of suits brought against federal officers, but also suits brought against "any person acting under that officer." 28 U.S.C. § 1442(a)(1).

Petitioners do not dispute the Eighth Circuit's holdings with respect to three of these four factors (causal connection, colorable federal defense, or person). Instead, they challenge only the finding that PM USA satisfied the "acting under" requirement. None of petitioners' arguments withstands scrutiny.

A. The Eighth Circuit Correctly Held That The Statute Should Not Be Given A "Narrow" Or "Limited" Interpretation

As a threshold matter, petitioners contend that the Eighth Circuit erred in refusing to interpret the statute in a narrow, limited fashion. Pet. at 20-21. Yet, as the Eighth Circuit correctly recognized, this Court expressly rejected such a "narrow, grudging interpretation" of § 1442(a)(1) in *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). The statute has even been recognized as an exception to the "well-pleaded complaint" rule. *Mesa*, 489 U.S. at 136.

Petitioners contend that *Willingham*'s directive is limited to instances involving federal officers, not a private party acting under federal direction. Pet. at 20-21. This Court, however, did not distinguish between the type of party asserting removal, but rather held that a broad interpretation of the statute is necessary to further the "policy" underlying § 1442(a)(1). 395 U.S. at 407. The policy applies with the same force regardless of whether the defendant is a federal officer or a private party acting under the direction of a federal officer. *See, e.g., id.* at 405-06; *Tennessee v. Davis*, 100 U.S. 257, 263-66 (1879).

In support of a narrow construction, petitioners cite to *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), in which this Court held that a federal agency does not constitute a federal officer. *Id.* at 81-82 (cited in Pet. at 21). But petitioners ignore that Congress subsequently amended the statute to reverse *International Primate* and clarify that agencies are federal officers. *See* Pub. L. 104-317, § 206(a)(1), 110 Stat. 3847, 3850 (1996). In amending the statute, Congress made clear that "[a] federal forum in such cases is important since state court actions against federal agencies and officers often involve complex federal issues and federal-state conflicts." H.R. REP. No. 104-798, at 19 (1996); *see also* S. REP. No. 104-366, at 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210. As the Eighth Circuit recognized, Congress' decision to amend the statute to overrule *International Primate* "provides further support for a broad interpretation." Pet. App. 6a.

B. The Statute Is Not Limited To Instances In Which The Private Party Is "Enforcing" Federal Law

1. The Plain Language Of § 1442(a)(1) Is Not Limited To Enforcement Of Federal Law

Petitioners argue for an extraordinarily narrow interpretation of § 1442(a)(1), asserting that the statute should apply only where the private party is serving in an official capacity by *enforcing* federal law. Pet. at 19-20. This Court has never interpreted the statute in such a limited fashion. Nor has any circuit or district court. In fact, lower courts have repeatedly recognized that, where the level of federal control is sufficiently strong and detailed, a private party may

be "acting under" federal direction in circumstances involving the *implementation* of federal policies and directives.[15]

Petitioners' argument is also squarely contradicted by the plain language of the statute. Section 1442(a)(1) provides that "any person acting under that officer" may remove under the statute. The generic language of the statute does not distinguish among the ways in which a party may "act under" federal direction, and nowhere does the statute provide that the party must be enforcing federal law. In essence, petitioners ask this Court to add a requirement that Congress did not include in the statute. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (the Court does "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there") (citation omitted).

Petitioners note that the statute provides that the removing party must have been sued "for any act under color of such office." Pet. at 19. But a federal officer can act "under color of office" in a variety of ways other than enforcing federal law. The "color of office" requirement is intended to ensure that the federal officer was not participating "in some kind of 'frolic of [his or her] own.'" *Willingham*, 395 U.S. at 409; *see also* 54 A.L.R. Fed. 442 § 2(b) ("color of office" requirement ensures that the conduct was "justified" by the federal officer's "federal duties"). Here, the FTC was clearly not participating in a "frolic of its own" in providing its direction to PM USA -- as discussed above, there can be no

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[15] *See, e.g., Winters*, 149 F.3d at 399; *H&H Ship*, 1995 WL 619293; *In re Agent Orange*, 304 F. Supp. 2d at 446-48; *MTBE*, 342 F. Supp. 2d at 156-57; *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 710-11 (E.D. Tex. 1998); *Pack*, 838 F. Supp. at 1102-03.

question that the FTC has broad authority under both the FTC Act and the Labeling Act to address the advertising and marketing of cigarettes. *See supra* n.2.[16]

2. The Policy Underlying § 1442(a)(1) Supports The Eighth Circuit's Interpretation

Petitioners' narrow construction of § 1442(a)(1) is also not supported by the purpose of the statute. Petitioners cannot point to any evidence that Congress was concerned *only* about "state animus against the enforcement of federal law," as they contend. Pet. at 22. Rather, as Congress explained in its most recent amendments to the statute, its "intent" is much broader: to ensure "that questions concerning the exercise of Federal Authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S. REP. No. 104-366, at 31; *see also* H.R. REP. No. 104-798, at 19 (same).

Accordingly, contrary to petitioners' suggestions, § 1442(a)(1) is not limited to instances involving the assertion of the "official immunity" defense. Pet. at 23. Instead, as this Court has held, the statute applies where the removing party asserts any colorable federal defense. *See Willingham*, 395 U.S. at 406. Indeed, Congress has specifically made clear that it intends for § 1442(a)(1) to ensure a "federal forum" for "important and complex Federal issues *such as preemption*," the federal defense at issue here. 142 Cong. Rec. S6517, S6519 (June 19, 1996) (emphasis added); *see also* S. REP. No. 104-366, at 31 (same).

In short, as the Eighth Circuit correctly recognized, this case presents a clear state law challenge to the FTC's exercise

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[16] Petitioners note that "this Court has expressly recognized statutory limitations on the FTC's regulatory authority over cigarettes." Pet. at 28. The only such limitation with respect to cigarette advertising is that Congress has reserved to itself the decision of what health warnings to require on cigarette packaging -- an issue that has no significance here. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 149-50.

of its authority over tar and nicotine measurements, disclosures, and marketing, and thus falls well within the ambit of § 1442(a)(1).

3. Petitioners' Reliance On An Analogy To 28 U.S.C. § 1443(2) Is Misplaced

Nor does *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808 (1966) (cited in Pet. at 19), support petitioners' strained interpretation of the statute. In *City of Greenwood*, this Court was interpreting a different statute -- the civil rights removal provision of 28 U.S.C. § 1443(2). There, defendants asserted that removal was proper because, by engaging in "civil rights activity," they were acting under the general authority of the Constitution and civil rights statutes. 384 U.S. at 810-11. The question before this Court was whether the removing party must show *any* relationship with a federal officer to remove under § 1443(2).

Beyond that, § 1443(2) has different statutory language and history and does not include the "acting under" language at issue here. Section 1443(2) is also much more limited in its purpose -- it is specifically intended to ensure a federal forum for parties that are sued for enforcing civil rights statutes. *See* 28 U.S.C. § 1443(2). By contrast, § 1442(a)(1) is intended to apply more broadly when a party is "acting under" federal direction. *See White v. Wellington*, 627 F.2d 582, 585 n.4 (2d Cir. 1980) (§ 1442(a)(1) is "greater in scope" than § 1443(2)). Contrary to petitioners' arguments, this Court never held that § 1443(2) "track[s]" the "acting under" requirement of § 1442(a)(1). Pet. at 20. Rather, this Court merely noted that there is an "overlap between the provisions," such that "many, if not all" of the cases removable under § 1443(2) would also be independently removable under § 1442(a)(1). *City of Greenwood*, 384 U.S. at 820 n.17.

C. The Eighth Circuit Did Not Conflate Removal With Conflict Preemption

Finally, petitioners mischaracterize the Eighth Circuit's decision as conflating removal with preemption. *See* Pet. at 24-25. The court did no such thing. Instead, the court properly defined the "acting under" test as "depend[ing] on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. That test is different from the conflict preemption standard, which examines whether state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000).

The language focused on by petitioners, in which the Eighth Circuit noted that the lawsuit "directly implicates the enforcement and wisdom of the FTC's tobacco policies," 15a, was part of the court's determination as to whether the "causal connection" requirement was satisfied. Petitioners do not challenge that finding here. In determining whether PM USA satisfied the "causal connection" prong, the court was merely determining whether the "acts challenged in the plaintiff's complaint" were the acts taken at the direction of a federal officer. Pet. App. 13a. That the lawsuit inevitably challenges the FTC's policies is one means of establishing that such a causal connection exists.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICK T. BEARD, III
STUART P. MILLER
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD PLLC.
425 West Capital Avenue
Suite 1800
Little Rock, AR 72201
(501) 688-8800

MURRAY R. GARNICK *
JAMES M. ROSENTHAL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20005
(202) 942-5000

Counsel for Respondent

* Counsel of Record

April 21, 2006